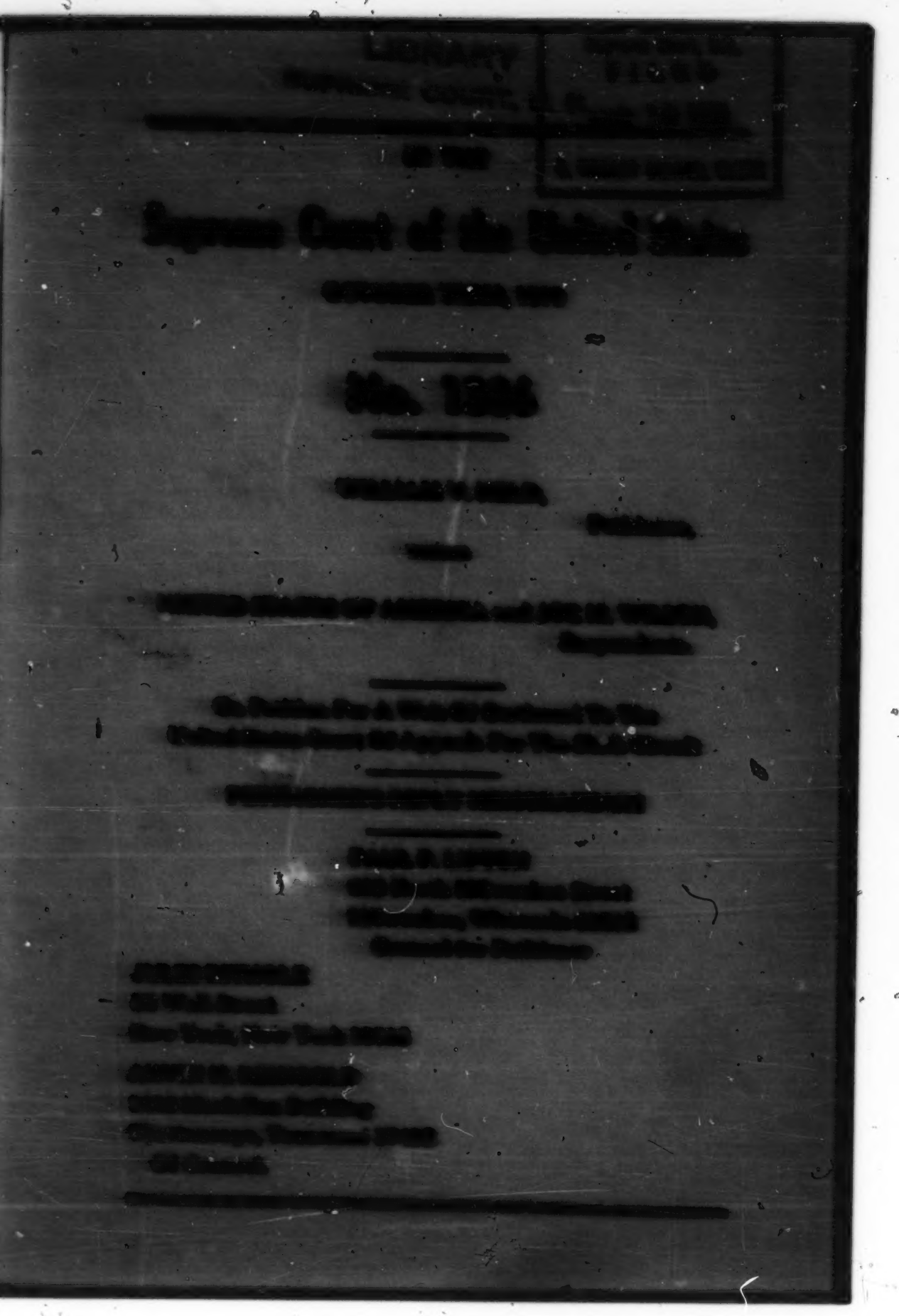

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1306

WILLIAM V. HELD,

Petitioner,

versus

UNITED STATES OF AMERICA and
JOE M. WILSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

Respondents' brief (pp. 3, 4 and 5) inexplicably repeats the untrue allegation that petitioner sold five of the corporations during the pendency of the litigation. During the proceedings on limited remand, Government counsel asked that the record be changed to correct the erroneous representation made to the courts below "that Mr. Held sold five corporations" and counsel apologized to the District Court for the "error". (Hearing Transcript, 9/30/70, pp. 3-4)

Actually, the five corporations were wholly owned subsidiaries of Continental Strategics Corporations, a

publicly held corporation which was not a party in the District Court. Petitioner sold all of his stock in Continental in a much publicized transaction on January 29, 1970, and he terminated his relationship with Continental on February 20, 1970. Thereafter, Continental merged with a subsidiary of Chadbourn Inc., a New York stock exchange company. (Speed Deposition, 8/20/70, pp. 4-5, 10, Exs. 1, A-F; Wilson Deposition, 8/21/70, pp. 15-16, Exs. 1-3, 16; De Matteo Deposition, 9/2/70, pp. 4-5, 12-13)

The respondents' brief (p. 3) relies heavily upon two discovery depositions which were not offered or received in evidence in whole or part. The depositions of Melvin A. Young and James T. Finney were not even filed with the District Court until approximately two weeks before oral argument on appeal. They were transmitted to the Court of Appeals as a supplemental record without notice to petitioner, and objection was made to reliance on these depositions in the Court of Appeals. It is, of course, clear that an appellate court may not properly consider a deposition not offered in evidence, even though it was included in the record on appeal. *Worsham v. Duke*, 220 F. 2d 566, 569 (6th Cir. 1955); *United States v. Brookhaven*, 134 F.2d 442, 447 (5th Cir. 1943); 2A Barron & Holtzhoff, *Federal Practice and Procedure* § 654, pp. 169-170 (1961).

The record does not support respondents' contention that petitioner was an individual having a "*de facto* position as the person in effective control" of each of the sixteen corporations. (Brief, p. 4) Indeed, the record contains little evidence relative to many of the

corporations and the bulk of the evidence pertains to the five corporations admittedly not controlled by petitioner.

The summons in question was issued to petitioner solely upon the basis of the special agent's suspicion of financial control. The agent testified that he did not know what relationship existed between petitioner and the corporations at the time the summons was issued. (Pet. 7-8) In any event, respondents cite no case holding that the production of corporate records may be compelled by a subpoena duces tecum directed personally to an individual not shown to be an officer or authorized agent of the corporation. The *Brussel* case, which conflicts with the holding below and requires proof that the party summoned is an officer or authorized agent, is now officially reported. *In re October 1969 Grand Jury, (Karl Brussel, Witness)*, 435 F. 2d 350 (7th Cir. 1970).

The IRS summons was not issued to and served upon petitioner as custodian of the books and records of the sixteen corporations, and it is not true that there was "a specific finding that petitioner had custody or control of the requested records." (Respondents' Brief, pp. 2, 5) Instead, the District Court merely made the alternative, conclusory "finding" that petitioner either has custody and control or has knowledge of the existence, non-existence, or whereabouts of the records. (Pet App. 12a) This was tantamount to no finding at all as to a crucial issue in the case.

Although the District Court ordered petitioner to produce all books and records of the sixteen corporations for all of the years specified in the summons, the respondents now contend merely that petitioner was "able to produce many of the records called for in the summons" and that petitioner failed to show that he "did not have the power to produce at least some of the records involved." (Brief, pp. 4-5; Emphasis added) This is a tacit concession that the District Court erred in entering its broad, unqualified enforcement order. Moreover, the respondents in effect concede that the trial court erred in ordering petitioner to produce the records of the five corporations now owned by a subsidiary of Chadbourn Inc.

The equivocal, alternative finding by the District Court, coupled with the respondents' concessions, compels the conclusion that both the summons and the enforcement order are at least bad in part. In *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951), this Court declared that a party "should not be held in contempt under a subpoena that is part good and part bad" and that it is not incumbent "upon the person who faces punishment to cull the good from the bad."

Respondents dismiss the constitutional issue raised by petitioner with the assertion that the custodian of corporate records may not refuse compliance with a summons. (Brief, p. 5) It was not established, however, that petitioner was the custodian of the records of any of the corporations. Moreover, petitioner's argument was not based upon anticipatory Fifth Amendment claims, as the respondents' brief implies. Respondents

have made no attempt to reply to the contentions raised in the petition for certiorari.

For the foregoing reasons, and those previously advanced, the Court should grant the petition for certiorari.

Respectfully submitted,

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